

ROUNDTABLE DISCUSSION

IS THERE A THREAT TO JUDICIAL INDEPENDENCE IN THE UNITED STATES TODAY?*

MODERATOR

*Honorable Harold Baer, Jr.***

PARTICIPANTS

*Honorable William H. Walls****

Honorable Edward R. Becker†

Honorable Morton I. Greenberg††

Honorable Jan E. Dubois†††

Honorable Stanley Sporkin††††

MR. LOWET: Good afternoon. My name is Henry Lowet, a proud member of the class of 1957.

The arrangers of this program needed someone who does not appear before these venerated judges. So I can speak with impunity in introducing them both briefly and harmlessly.

I want you to know that the introductions are simplified because I can tell you that these gentlemen are all over the age of thirty-nine, they all went to the same law school, they graduated in the same class, and they universally took a vow of poverty so that this is a very comfortable time for them and for us. In reality, those of us who knew all of these men when they were students here recognize that they had a great bent for public service. When we went out to pizza on Sunday nights, they all remember and we all remember how we discussed the notions, the important notions, of judicial philosophy — whether to order pepperoni or double cheese — and all those things that make the judges the outstanding individuals they are.

We do remember how, I would say, at least half the panel here are men whose families and careers really indicated a tradition of

* This panel was presented at the Alumni Weekend at Yale Law School on Saturday, September 27, 1997.

** United States District Judge, Southern District of New York.

*** United States District Judge, District of New Jersey.

† Chief Judge, United States Court of Appeals for the Third Circuit.

†† Circuit Judge, United States Court of Appeals for the Third Circuit.

††† United States District Judge, Eastern District of Pennsylvania.

†††† United States District Judge, District of Columbia.

public service. The Yale Law School has strengthened that notion of public service, and I think that it is entirely fitting that we have an opportunity to hear them, to talk about one of the great subjects that concerns the judiciary.

There is one sub-text here and that is that the five judges, other than Judge Baer, who will soon be the moderator, will be asking that important question, "Why would Judge Baer ever want to talk about judicial independence?"

Without further ado ladies and gentlemen, it is my pleasure to introduce my great classmate Judge Harold Baer.

JUDGE BAER: I want to welcome all of you to this forum, and I am going to say very little because I know that all of my classmates that are up here with me are extremely verbal, and I have sent them all a program. I am interested to see how close we stick to that program. I did want to set the stage just a little bit since I may have played some role in the eye of the judicial independence storm, perhaps more than these judges who, by the way, constitute a greater number of Article III judges than in any other Yale Law School class.

We are missing one female judge, Anna Johnston, who regrets she could not be here today, and sadly we are missing Roy Daly, who passed away earlier this year. Otherwise, we are all here and apparently in good health.

In any event, I do not want to waste any of your time, and I want to hear what all my classmates have to say; and I want to be sure that we also have a moment for questions. My hope is that we will be able to talk both about federal and about state judges and what judicial independence means to them because from my standpoint I think Article III judges are somewhat more protected as compared to those judges that are appointed in New York, and I assume in most of the states of the United States, primarily by politicians such as governors or mayors.

JUDGE BECKER: I was appointed by a politician too.

JUDGE BAER: Yes, right, but you are appointed for life, allegedly.

JUDGE WALLS: Allegedly?

JUDGE BAER: That is really the difference. Presumably on good behavior, right? You have heard of that?

JUDGE WALLS: You have. I have not.

JUDGE BAER: Ah-ha! I have indeed, but I want to let each of the panelists answer a first question which is: Whether in their mind there is a threat to judicial independence in the United States today; and if so, what it is. I will start with William Walls, who is a relatively new District Court Judge for the District of New Jersey.

JUDGE WALLS: When thinking about that subject, my initial thoughts — or my thoughts now — are that in twenty years as a state and now federal judge I have never truly been conscious of any judicial interference of the type that you are talking about. The only judicial interference I have ever had has come from appellate colleagues, such as Becker and Greenberg, who have disagreed with what I did. That has not been that often, fortunately.

In any event, my concern, therefore, is not as personal as yours might be [J. Baer] because of what you did or did not do which made you in effect the Willie Horton of the 1996 election, which was unfortunate. I think something more strikingly pernicious, insidious, and dangerous is what is happening generally and that is what I consider the great stall. The great stall, the great refusal, the conscious refusal by a partisan majority Senate to confirm judicial nominations.¹

I frankly think that there is hardly any argument that one could make to the contrary. In 1992, the last year of the Bush Administration just before the election, a Democratic-controlled Senate confirmed sixty-six of his nominations, including circuit judges. In 1996, a Republican controlled Senate passed the “oh yea” on seventeen, I believe, confirmations non-circuit. This year, I think to date, there have only been about seventeen judicial nominations passed by the Senate.

Now, unfortunately, the malaise seems to have been, until recently, accepted quite passively and explicably by an administration which really until recently has done nothing! So we have on the one hand a conscious desire to do nothing and an acceptance of that by two branches of government to the detriment of the third branch, because regardless of whether one is a Democrat, Republican, Independent, Liberal, or Conservative, or whatever he or she may be, this causes, I think, a concrete danger to the integrity of the judiciary. I think it is without precedent, and I think with the exception of sheer political gall, it has no merit

1. See *Judicial Efficiency: Is there a Vacancy Crisis Threatening the Nation's Judicial System?*, 26 FORDHAM URB. L.J. 33 (1998).

whatsoever. It is amazing that a President who is a lawyer, who went to [Yale], would tolerate this.

Now I understand that this week, fortunately, Nina Totenberg, on public radio, devoted a weekly series to this circumstance because we now have about one hundred judges waiting for judgeships to be filled and sixty-six have finally been sent for nomination.² She devoted a daily discourse on morning radio. I heard it and I could not believe it. The President this morning devoted his weekly broadcast to criticizing the delay of the Senate. So I would suggest that is a danger to judicial independence because one of the main Republican leaders says his desire is to intimidate us and that is one of the means that they use. So those are my observations.

JUDGE BAER: All right, thank you very much. Why don't we just keep going and turn to our senior Ed Becker from the Third Circuit — not necessarily in age, but in terms of bench time.

JUDGE BECKER: First of all I do not think what Bill Walls just talked about had anything to do with judicial independence. There are a lot of problems out there that have a lot to do with our polity. There are a lot of things that Congress is doing in this law and order age, such as passing legislation in the criminal field which is extraordinarily harsh, and politicians at large are engaging in rhetoric which are seeking to interfere with the decisional independence of judges. But while the legislation and the failure to confirm judges has overall effects on our polity, it does not affect my independence as a federal judge.

I have been a federal judge for twenty-seven years, and I have encountered no interference with my judicial independence. I am the only judge among the nine Courts of Appeals judges in the Second, Third, and Ninth Circuits who wrote an opinion holding that Megan's Law³ was unconstitutional, that it constituted

2. *Morning Edition* (NPR radio broadcast, Sept. 26, 1997).

3. N.J. STAT. ANN. §§ 2C: 7-1 et seq. ("Megan's Law"). The law requires sex offenders to register with local authorities, and also contains a community notification provision. *See generally* Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (1995) (holding that Megan's Law was remedial and not punitive, and thus did not violate the ex post facto clause of the Constitution). Under Megan's Law, a "person confined in a correctional or juvenile facility or involuntarily committed who is required to register shall register to release in accordance with procedures established by the Department of Corrections or the Department of Human Services." N.J. STAT. ANN. § 2C:7-2(c)(2) (1995). Essentially, Megan's Law establishes a three-tiered system that mandates advance notice to the community when sex offenders are released into the community. *See generally* Sheila A. Campbell, Note, *Battling Sex Offenders: Is*

punishment, and violated the ex post facto⁴ and double jeopardy⁵ clauses of the Constitution. I have no doubt that if I had garnered one other vote, I would be under the U.S. Marshal's protection as Judge Chin was in the Southern District of New York. The point is that such an unpopular decision is made possible by judicial independence, and I have encountered no threat to that independence.

There are really two kinds of independence. When you talk about judicial independence, you have to define your terms. One is decisional independence, that is my ability to decide a case solely on the merits free from pressure; and the other is institutional independence. To talk about institutional independence of the judiciary, by which we are referring to checks and balances — the judiciary as a check and balance on the other branch — when we start getting legislation like we recently got, such as the habeas corpus legislation and some of the immigration legislation, where Congress passes legislation that strips the federal courts of the power to curb coercive administrative agency activity, or regulatory activity which deprives prisoners and others of the right to vindicate constitutional rights in a federal judicial forum, then you are arguably impinging upon institutional independence of the judiciary.

If we are talking about decisional independence, and I think that is mostly what we are talking about, federal judges have it, Hal Baer had it, my colleague Lee Sarokin had it — he chose to resign, but he could have stayed on the bench and weathered the storm. In my twenty-seven years on the bench, I have seen the pendulum swing. The republic will stand. The republic is very strong in this respect.

Where I worry, and where I think there is a serious threat to decisional independence in this law and order era, is in the state courts, where politicians are beating up on judges mercilessly if they do not come down, particularly in criminal cases, with the kinds of decisions that the politicians like. That is where the serious problem is because many state judges have to run for election, or re-election, or retention. Even a judge who is

Megan's Law an Effective Means of Achieving Public Safety?, 19 SETON HALL LEGIS. J. 519 (1995).

4. See U.S. CONST. art. I, § 10, cl. 1. An ex post facto law is defined as “[a] law passed after the occurrence of an act, which retrospectively challenges the legal consequences or relations of such fact or deed.” BLACK’S LAW DICTIONARY 580 (6th ed. 1990).

5. See U.S. CONST. amend. V.

appointed in the state court who has to be retained may find an unpopular decision, a courageous but unpopular decision, the source of opposition in a retention election.

The only area where it applies in the federal court is if you have a judge who aspires to go to a higher court. If you have a district judge who wants to go to the Court of Appeals, well that district judge's judicial independence may well be affected if that judge fears that a decision which he or she thinks is the right decision, but where it may set aside some state statute, or may free a habeas petitioner, or grant a suppression motion in a high-profile case, and, if the judge feels that this will impede or impair his or her advancement to a higher court, in that sense, federal judicial independence is interfered with. But nobody has a right to be on any particular court. I happen to have paid my dues to the Republican Party in Philadelphia at a certain time; and I was, unlike all of these other merit appointees - a patronage appointee. Nobody has any particular right to be on the bench, but the public does have a right, everybody has a right to have the decision in their case made by a judge who is impartial and who is not subject to these kinds of pressures. What we ought to be worrying about is the state courts. We have all these federal judges here, including Judge Clay from the Sixth Circuit, and Judge King from the Fifth Circuit in the audience, but we also have Justice Neely from the West Virginia Supreme Court. He could tell us about what it is like for a state judge who has to run for re-election to face these kinds of problems.

JUDGE BAER: It is those state judges that have to run for reelection or are appointed for short terms that are certainly my concern as well. I would just like to go through the group if I can.

JUDGE WALLS: I want to respond.

JUDGE BAER: You want to respond? Well, you will have the opportunity, but let us hear from each judge once before responses.

JUDGE GREENBERG: Well I have a certain insight in this matter both from a state and federal viewpoint because I was a State Superior Court Judge on the trial and then the intermediate court of appeals level in New Jersey which is exactly like the federal system-trial court, intermediate court, and the Supreme Court.

Judicial independence is no problem at all in New Jersey with judges. The judges are all appointed and half of them from each

political party. In fact, my brother who is a Democrat was appointed by a Republican governor in 1972, and the same governor appointed me. I happened to be a Republican in 1973 whereupon my mother said that he was the greatest New Jersey governor ever.

It was a seven-year term; and as it happened, when each of our terms ran out, the governor was then a Democrat and he reappointed both of us without even a thought as far as I know. In a state like New Jersey, which has an appointed judiciary which is not partisan at all, it would be silly to say that there is a concern about judicial independence and decision making. As far as the federal court is concerned, I cannot even conceive of making a decision, as Judge Becker put it, that would cause me to sit there and be concerned. You would make the correct decision.

I want to say something which is important and cannot be overlooked. Judge Baer sent a letter to each of us, and he said he was going to ask us a question, "Is there a threat to judicial independence in the United States today; and if so what is it?" Well bear this in mind, to a degree there ought to be a threat to judicial independence. Now this is going to shock everybody, but I have to tell you something. I am very good at reading wills and telling you whether or not the trust provisions violate the rule against perpetuities. I am very good at reading charges to the jury to make sure that the judge charged right on proximate cause and whatever else may be. I am very good at reading affidavits to see if there is probable cause for a search warrant. I am not so good at running institutions. I am not so good at changing things in society, and I want to tell you, and I know that this is not the trend and this is not the way I am supposed to think when I am in New Haven.

I went to Yale Law School, but I practiced law for eleven years in a town of 4,000 people with either one lawyer or no lawyer. I want to tell you, the world looks different in Cape May, New Jersey than it looks in New Haven. It looks a lot different. If you are talking about judges who want to take over institutions and make far-reaching changes in our society, they are no more entitled to be free of criticism and attacks than is the President of the United States. We do not think in terms of Presidential independence or Congresspersons. The Congress and the Senators do not have independence in the sense that they cannot be attacked for their decisions. I am dead serious about that!

There are many things that I see that Congress and the Legislature do that I do not happen to agree with, but it is not for

me to say. They ran for office. I did not run for office. I had nothing to do with running for office. So why should people who have a mandate which consists of the fact that an executive, the President or the Governor, and the Senate confirm them, think that if they make far-reaching changes in our society, that something is wrong when they are attacked for making those changes.

I tried a case as a state judge — well it was more than a few years ago; it was twenty years ago. I remember thinking to myself that this cannot be real. In the face of what amounted to a liberal, very fine and caring Democratic administration, where the Commissioner was a wonderful woman running an institution, that some people wanted me to take over the institution and run it. I thought they were very misguided, and I am dead serious about that.

So if you are going to act like judges and you are going to make decisions, you are entitled to the judicial independence. If you think that a search was invalid, people can question it; but that is your decision, and that is what you are entitled to. If you want to make far-reaching changes in society, do not think that you can stoke the fire and not get burned. I think it is really important, and I know again this is not everybody saying “oh isn’t this great we made all these changes and everything.” Let the Legislatures and Congress do it. Then you will not have the problem.

JUDGE BAER: I am controlling myself.

JUDGE GREENBERG: Well I said you are entitled to the independence when saying whether a search is due.

JUDGE BAER: I am really talking about the Prisoner Litigation [Reform Act].⁶ I think it is clear that I did what I thought was right both times.

There really is not any problem on that score. I think what [J. Greenberg] is talking about now is that the role of the Legislature is and should be significant in terms of changes in the law and

6. Pub. L. 104-134, 110 Stat. 132 (1996) (codified as amended at 18 U.S.C. § 3626, 28 U.S.C. § 1915, 28 U.S.C. § 1346, 42 U.S.C. § 1997, and other scattered sections) [hereinafter PLRA]. “The PLRA addresses lawsuits filed by prisoners challenging the conditions of their confinement.” Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 2 (1997) (noting that the PLRA “covers both suits dealing with the complaints of individual prisoners and suits dealing more broadly with conditions at entire institutions or in prison systems”).

sometimes, I think, as does the Supreme Court, those changes are unconstitutional. One of the ways in which they have attempted to do that only this year or last is in the PLRA, where, I will not take any time away from Bud, but that Act essentially does away with consent decrees in the correctional system.

The problem, and I guess this is what [J. Greenberg] was saying, and I do not disagree with him completely, is that Congress has a significant role.

JUDGE DUBOIS: See, he is in a different circuit. I am sitting up here wondering how I could disagree with [J. Greenberg] who sits on the Court of Appeals in my circuit.

JUDGE BAER: I upheld as constitutional the PLRA in New York even though I am sort of supposed to be running Rikers Island, but the PLRA for all intents and purposes does away with that consent decree. In fact, Judge Calabresi was able to affirm me but also find a way to keep those consent decrees going across the street through the state court system. Only a Yale Law School Dean could have done it — but I am glad he did it. Anyhow, [J. DuBois], it is your turn.

JUDGE DUBOIS: Yes, I agree with a little bit of what both of my good friends [J. Becker] and [J. Greenberg] said. I think you have to analyze the question of judicial independence in terms of institutional independence and decision, or case-by-case independence. The federal Judiciary, has never been completely independent as an institution. Congress has the right to legislate on procedures, on what we do. They enact laws, they repeal laws, and we interpret those laws. The advice and consent power gives them the authority to scrutinize candidates. So they have always had that power; and last, but not least, they have the power of the purse. They are the guys who decide how much money the Judiciary gets, and I am not talking about salaries — they have that right too. I am talking about a budget.

In recent years, I guess beginning during the Reagan years, the Senate and then the House became much more intrusive — and I am going to use that word — intrusive in the affairs of the Judiciary. Up to that time, with all of that power, the Congress was not really intruding into what the Judiciary was doing. We remember tales of the Litmus Test the nominees during the Reagan years had to pass. I can tell you that I was a Reagan nominee. I did not have to pass a Litmus Test. I was not asked

about my views on abortion or any other controversial subject likely to come before me.

Now I think the remarks on the Congressional side are downright strident. They move from institutional independence to decisional independence. The calls for impeachment and resignation are absolutely absurd. It was thought that Samuel Chase's case in 1805 put to rest pretty much the idea that the House would be able to vote Articles of Impeachment against a judge for deciding cases in a way that was unpopular. To refresh everyone's recollection, because I know Samuel Chase is on everyone's mind, Samuel Chase was a Federalist, and the Jeffersonians did not like what he was doing on the Supreme Court. They engineered an impeachment, several Articles of Impeachment; but the Senate did not vote to impeach. The bottom line is there have been modest threats along that route down through the years; none have succeeded. I do not think anyone is going to get impeached; but a lot of people are going to be very uncomfortable, not just Harold Baer.

One week ago today, headlines proclaimed, in our Philadelphia Inquirer: "Slain girl's parents want District Judge impeached." Now that is not Harold Baer they are talking about.

JUDGE BAER: Believe it or not.

JUDGE DUBOIS: If you had been in that district, it might have been. I have to tell you that Suzanne Baer said we should lighten up this presentation. It's 3:30. By the time you speak it will be four o'clock, and I am trying to do just that.

What has happened, because of the strident comments and the criticism, is that we have seen a move in criticism from principled criticism to partisan criticism. I do not know where you draw the line. I am only going to pose the problem. Judges are not immune from criticism. We cannot be. Criticism is going to be helpful to us in our decision-making, but the criticism has gotten to the point where it is harmful; and the place where it is hurting us the most is in public confidence. The public is looking at the courts today — not just the federal courts, all courts are the same to most people who are not "law trained"—the confidence of the public in the court system, in laws and lawyers, is almost at an all time low; and it is being fueled by people like the Chairman of the Senate Judiciary Committee and the Chairman of the House Judiciary Committee who call for the impeachment of judges — those judges

who, according to them, go off on their own and do not follow the Constitution and declare laws unconstitutional.

JUDGE BECKER: But [J. DuBois], I want to know how does criticism or a call for impeachment impair the independence of the federal judge who is being criticized? If I were being criticized, I remember my life tenure; and I hope I have got some intestinal fortitude, and I will weather the storm.

I understand. I agree with you that there is a problem of public confidence, but that is a different question — like the questions about what some of this legislation is doing to our polity — that is a different question from independence of the judiciary. Tell me how this criticism impairs or impinges upon the decisional independence of the federal —

JUDGE WALLS: Because there is no alternate question. It is not a question of intestinal fortitude on the part of any of us. It is a question of how one defines impeachment. When you have the second-ranking Republican, when advised that a person who, I think, is close to your ideological bent, the Chief Justice, reminded us all that impeachment is subject really only to the commission of High Crimes and Misdemeanors. This Republican says, “No, impeachment represents only a majority of the House and two-thirds of the Senate.” So, consequently, one therefore may well be the subject of impeachment for anything, and that is how it impairs and reaches —

JUDGE BECKER: [J. Walls], that is nonsense and they know it is nonsense.

JUDGE WALLS: That is not nonsense. It is nonsense because he said it. That is nonsense.

JUDGE BECKER: First of all, I am not going to comment on . . . I have been a judge for twenty-seven years, and my ideology is long behind me.

A good judge is non-doctrinaire. The notion . . . these folks that are calling for impeachment of federal judges on the basis of decisions are posturing. They know too well that it is not going to happen, that it cannot happen.

JUDGE WALLS: Why do they say it? Because they want to intimidate.

JUDGE BECKER: Well sure they do, and they are seeking political advantage; but the lesson of this is that federal judges who do have life tenure, and who do have independence, cannot be

impeached for decisions that they make, and everybody knows it, including the people who are calling for it, and the rest of the Congress and Senators are not getting anywhere, they are laughing at them. I do not care how many signatures there are, that are on the petition in Lancaster County, that is not going to get anywhere either.

However, when this problem occurs in the state courts where people may be bounced out of office or not be retained, I think it is a serious problem.

JUDGE BAER: [J. DuBois], are you finished?

JUDGE DUBOIS: Well I am. [J. Sporkin] is getting restless. He has never been quiet for so long in his life.

I have got to tell you he has written some notes. I do not know whether you can read them, but they are positively illegible.

JUDGE SPORKIN: That is the false page. That is the cover.

JUDGE BAER: Judge Sporkin, as you know, sits in the District of Columbia. He has a little different bent, perhaps.

You know I thought when we came here today that one of the things we were going to do was to out Mort Greenberg and prove that he really is an activist judge.

I think that is going to have to wait for another day. You know if anyone thinks that this independence is not a serious problem, then I think they ought to go back and realize what is happening here today.

JUDGE DUBOIS: He sits in a different circuit too.

JUDGE SPORKIN: At my age, it does not matter. Independence is an extremely important issue. There is what we call institutional independence, and decision-making independence. If Congress cannot deal with the issue directly, it has other ways of attacking the Judiciary. With respect to the Hal Baer incident, we have more than Congress getting into the act. The President of the United States, who graduated from this law school and should know better, said he is going to look into impeaching Hal Baer. Now, the President of the United States should know better.

What bothers me is that as judges we are our own worst enemy. Remember, we are the ones who must finally adjudicate whether there has been a breach of the separation of powers doctrine. However, we seem to always shun this responsibility. Sitting on this panel, I am somewhat mystified to hear my colleagues say it does not bother them to uphold laws that cut back on judicial

authority. I am critical because it seems to me at some point we should say no, Congress, you cannot tell us how to discharge our responsibilities.

A couple of weeks ago, Judge Aspen made a rather telling point in commenting on the sentencing of defendants. He said Congress is unwilling to vest in a person who is usually in his fifties, who has had vast legal and other experience, has been nominated by the Senator of his state to the Judiciary and has been put through a strict vetting process. He said you would think this is the kind of person in whom Congress would readily give discretion to impose a sentence. Of course, this is not the case. Instead, Congress gives discretion to some Assistant U.S. Attorney some two years out of law school. Just think, this Assistant can come into court, tell the Judge what sentence he or she can impose and what charges are going to be asserted. The court is powerless to do anything about it.

So it is an extremely serious problem with which we have to deal. Anytime a Judge issues a decision that some brand as a liberal decision, the Judge is immediately labeled an activist. This is essentially the "kiss of death." I ask what about "Magooist" judges, those who do not look to see what consequences their decisions might cause. Look, there are judges that say "we do not care what the result is." They simply say while their decision can be unjust, "we do not care, the law books made us do it."

This is troubling. What concerns me is institutions like Yale and the American Bar Association ought to be addressing these issues and they are not. I am concerned that the Judiciary is becoming less equal than the other two branches of government. If so, the public could be severely hurt.

One way this is happening is by legislation that is curtailing the judiciary's functions. At this time, there is a proposal that would allow a litigant to disqualify a judge on a peremptory basis just because the litigant does not like the judge. If this passes, we are going to become the very kind of judge that Mort Greenberg is talking about — somebody interpreting wills and contracts. We are not going to be judges called upon to determine whether a law violates the Constitution.

JUDGE BAER: Mort, you get first dibs on Judge Sporkin if you choose.

JUDGE GREENBERG: Well you know, it is like anything else. You have got to come to grips with the basic thing. If you wanted

an undemocratic institution, you could not improve on the federal courts. How would you improve on the federal courts? What you have done is that you have taken one person, the President of the United States, and that person — and I understand it is a political process on how that person gets the name — but you have taken one person who is the President of the United States, and he takes this name and that person goes to the Senate, the Senate confirms, which means the President can then appoint, the President appoints him, and this vast power is placed in a person for the rest of his or her life.

I do not know what could be more undemocratic. There are many laws. Look, I have to say this very frankly. Myself, I would clear up the backlog because a lot of the laws that I work on and enforce the way I think they should be, if it were up to me they would be repealed. So that would be a very simple thing. It would cut back a lot of federal cases, but the fact of the matter is that judges must understand. There is a reason. They should be undemocratic because they have to; they have to confine themselves to their proper role. If they confine themselves to the proper role and recognize that they are not the persons who are elected, they do not have to go out and defend their decisions; and they ought not to then say we have a right to make these far-reaching societal decisions.

Personally, I think the only purpose of the sentencing guidelines is to provide appellate court judges an opportunity to write interesting intellectual decisions.

I cannot see much else to it; but the fact of the matter is that if Congress wants, Congress actually could fix the sentence for every crime. They could say the sentence for this crime will be five or ten years. If Congress wants to do it, Congress has a right to do it.

JUDGE SPORKIN: I do not agree with you. What about the Eighth Amendment? Do we repeal that too?

JUDGE GREENBERG: Well, I guess if the sentence got so long that, for example if Congress wanted to say that any drug possession case required a sentence depending upon certain standards of ten years or twenty years, I cannot even imagine — as a matter of fact I do that with minimums — why Congress cannot say a bank robbery is twenty years! Now you can say “but the kid had a tough upbringing.” How could it be that Congress cannot do that? These are the people that were elected, you know; and that is the problem with democracy.

JUDGE SPORKIN: You have got the Eighth Amendment, and the people who decide whether the Eighth Amendment has been violated are the courts.

JUDGE GREENBERG: Well of course.

JUDGE SPORKIN: I thought that is who we were.

JUDGE GREENBERG: If the sentences were so harsh and so disproportionate to the crime that even with all the deference that courts must give, they could say that it was simply cruel and unusual, then you would run into that problem. That would not be the issue. It would not be. If Congress said every bank robbery is fifteen years, there is no Eighth Amendment problem.

JUDGE BAER: Do you have a thought about this project that we have walked into?

JUDGE BECKER: I do not think it has anything to do with judicial independence, which is what we really came here to talk about.

JUDGE WALLS: I agree with my appellate superior.

JUDGE DUBOIS: I do not, and I disagree a bit with what [J. Sporkin] said. We have the right to declare a statute unconstitutional.

JUDGE SPORKIN: But, we do not.

JUDGE DUBOIS: Well that is because for some reason or other we are not looking at the statute hard enough.

It is easier to say the statute is okay. That is the easy way out. The tough way out is to declare a statute unconstitutional. If we do not like the PLRA because it cuts back on the rights of prisoners, then we can do something about it. If we are wrong, the Court of Appeals will take a look at it.

I think what we are seeing is a Congress that is more responsive to the mood of the public. They are tired of hearing day after day about prisoner's rights, about defendant's rights, and about the accused's rights. They want to hear more about victim's rights. When you sentence, you get to see firsthand what the victims have to say. Congress is responding. They are not exactly using any kind of restraint, and I think that is a problem.

On the other hand, I think the message is out there: our courts are not completely independent. We are not independent of public opinion. If the court decisions go one way and the country is going another way, we are going to have a calamity. The Supreme Court

has long recognized the public opinion as a basis for deciding issues. Justice Souter did it the last time he had an opportunity to write on the abortion issue — *Roe v. Wade*⁷ having been ingrained in the country's life. We are not free from criticism, and we can do pretty much what we think is right. I agree with [J.] Becker, threats of impeachment should not be taken seriously.

JUDGE SPORKIN: Even when the President says it?

JUDGE DUBOIS: Well I think that should make the target a little uncomfortable.

We will ask the target to tell us how uncomfortable he was. I can tell you that my colleague who has been criticized for an opinion and whose impeachment has been called for has not let it bother him. I agree with that. I do not think it is going to affect the decision-making of individual judges, but by the same token I think judges have to get the word: a little judicial restraint is not uncalled for. You know, you can be a judicial activist and go either way. Judicial activists are not just liberal judges. They can be activists —

JUDGE SPORKIN: "Magooists."

JUDGE DUBOIS: Yes, [J. Sporkin] coined the phrase in the District of Columbia; but the long and the short of it is, I think, more restraint has to be exercised both by Congress and by the courts, and we have to settle down to the way the relationship between the three branches was being handled in the 60s, 70s, and early 80s.

JUDGE SPORKIN: [J. DuBois] did not agree with me, but I agree with him completely.

JUDGE WALLS: No, I think we are somewhat misdirected with regard to what we say now because I did not think this was going to be an exercise in the discussion of judicial restraint or activism, notwithstanding what good old [J.] Greenberg said.

Frankly, I agree with him and probably all of us agree. Congress has the right to do a lot of things. Congress has a right to make law subject to *Marbury v. Madison*,⁸ and I only suggest that Congress exercise its right and its obligation with regard, through the Senate acting, to the Constitution that says that the President shall nominate judges with the advice and consent of the Senate. I think that is how we have an impairment of judicial independence. I have no argument with what my other appellate friend says for the

7. 410 U.S. 113 (1973).

8. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

simple reason I have never said, nor do I suggest, that anyone has a right to be a judge; but anyone who is nominated has a right to be voted up or down. I think not to do so borders on being unconstitutional, and this is a threat to the Judiciary particularly when there are one hundred unfilled vacancies out of about an eight hundred person Judiciary.

So I suggest that the threat comes from a perversion now of the process; and that is, as I said earlier, that the Senate is not acting and it is deliberately not acting. Whether they like you because you are an activist or dislike you because you are an activist, I think it is important to be an activist. If you do not believe in an activist conservative court, look at our Supreme Court. Be that as it may, that is something else.

So, consequently, all I am saying is let the Senate do what it is supposed to do. Let it exercise its right to advise and consent.

JUDGE BAER: Does anybody else on the panel have a thought that they would like to express or ask a question?

JUDGE SPORKIN: Yes, the only thing I wanted to add is that we are marginalizing the Judiciary. We are not indicating how important the Judiciary is to this nation. I point to the case of *Brown v. Board of Education*.⁹ Congress was unwilling to act. No branch of government other than the Judiciary was willing to act. There would have been another Civil War if somebody did not step in and take action at that time. The Supreme Court stepped in and made the right decision. I love to hear my "Magooist" friends explain how they would have come to the same decision but on a different basis. We know the so-called strict constructionists were really against it. It was a tough decision. But the Supreme Court got it right.

I guess it was last year when the Supreme Court rediscovered substantive due process when it held a punitive damages award for a botched BMW paint job was excessive.¹⁰

What I am saying is that the courts have always played an extremely important role in society and we should not marginalize what we do and make us a branch of government that simply interprets "wills." I do not even like drafting them.

9. 349 U.S. 294, 301 (1955) (holding that racial discrimination in public educational institutions was unconstitutional and ordering states to integrate "with all deliberate speed").

10. See *BMW of North America v. Gore*, 517 U.S. 559 (1996) (holding that a two million dollar punitive damage award assessed on BMW for its failure to disclose the repainting of a new car is grossly excessive).

JUDGE BECKER: We are hearing from the highest profile judge in the District of Columbia. I once told Chief Judge Penn that he ought to conduct a Grand Jury investigation into the wheel of the Clerk's Office because I could not understand how Judges Sporkin and Richey got all the high-profile cases that got them on the front page of the *Washington Post* once a week.

When [J. Baer] called and asked me about this program, I said to have a program on the independence of the Judiciary at a Yale Law School Reunion is like preaching to the choir. I mean, we do not have to persuade this crowd; but inasmuch as Stanley has raised it, I endorse what he said. I will reference, a colleague of [J. Sporkin's], Judge Sirica¹¹ of the District Court for the District of Columbia, and the decision on the Nixon tapes which basically broke open Watergate. A judge without life tenure, a judge without independence, would not have had the courage or the ability to make that decision. State judges ought to be life tenured just as we are because the only way to get that kind of independence is to give the judges life tenure.

I have found my independence growing and growing over the years, but I always had it from day one; and I can tell you that difficult decisions — I mean I mentioned the Megan's Law case, which is the most recent one, but that is one of many — are decisions which any human being who had to run for election and wanted to get re-elected might be reluctant to make but for that independence which is assured by life tenure. I use the term polity. I cannot think of anything more important to the survival of the republic than the independence of the Federal Judiciary as we continue to get these big cases.

My only disagreement with [J. Sporkin] is this: while there is a lot of posturing out there, I have invoked the Eighth Amendment to invalidate statutes and certain administrative action, and I do not see any threat to my ability to do so for as long as I am on the bench, notwithstanding all of the furor. The big advantage of this life tenure is that you see administrations come and go. Boy, I have seen them come and I have seen them go; and I am still here, and I am still doing my job as always.

11. Chief Judge John J. Sirica of the United States District Court for the District of Columbia ordered President Richard Nixon to produce, for examination in camera, certain items identified in a subpoena so that the court could determine whether the items were exempted from disclosure by evidentiary privilege. *See Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

JUDGE BAER: On that note, we will be glad to take questions from the audience. Judge Calabresi.

JUDGE CALABRESI:¹² I want to address a question with what will be a fairly long talk.

I have been a judge for three years. Unlike [J. Becker], I am not that far removed from my previous job, and so I will talk more as an academic than as a judge. In that vein, let me hazard the view that there are all sorts of different things that you have been discussing that may or may not impinge on judicial independence.

The first one (and I agree with [J. Becker] on this) is the only one that is truly crucial. It is the question of whether impeachment of judges who decide cases in ways that are unpopular is a serious possibility. When politicians suggest impeachment or forced retirement, then we all have to take up arms because, if impeachment comes to be a reality, judicial independence would be demonstrably diminished. And that is a danger that we surely have to guard against.

It is because this danger is of a different order of magnitude from all the other threats that have been talked about, that five former and current Chief Judges of our Circuit did something unheard of when Harold Baer was attacked; they spoke up in his defense.¹³ Threats of impeachment for “bad” decisions have to be knocked down — even though the threateners are usually just posturing — since what is rare posturing can become common posturing, and common posturing can become habitual, and, after sufficient time has passed, out of habit, what was just “show” can become all too real. And if impeachment came to be accepted, then Eddie would not be protected, and that would surely be a noxious change in our system of government.

Once we are over that step, we have crossed the most important line. Once impeachment is out of the picture, I agree completely with [J. Becker] about what a judge ought to do when politicians, or newspapers, or anybody else criticizes that judge. That judge should do what the newly appointed Oliver Wendell Holmes did when President Theodore Roosevelt, in criticizing him for a decision, thundered that Holmes had the backbone of a weasel (or something of that sort). Oliver Wendell Holmes lifted himself up

12. Circuit Judge, United States Court of Appeals for the Second Circuit. Judge Calabresi graduated from Yale Law School in 1958, and served as its Dean from 1985 to 1994.

13. See *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L.J., Mar. 29, 1996, at 4.

to his great height, tweaked his mustache, and said, "Now, Mr. President, you can go straight to hell."¹⁴

While freedom from impeachment for wrong decisions is the most crucial issue and matters more than anything else, there are things other than impeachment that can affect judicial independence in ways that are dangerous. The most troubling one, and again [J.] Becker mentioned it, is the fact that judges want to be promoted. That is a terrible thing. If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up. District Court Judges want to go to the Court of Appeals and so they care what politicians think of them. And even Court of Appeals judges who have no chance whatsoever to go to the Supreme Court start to act funny when some idiot journalist writes, "So and so is a good judge, and ought to be on the Supreme Court." All of a sudden that judge starts to "dance."

As a result, some people think that only those who are my age ought to be appointed to federal judgeships because we are beyond hope.

Others suggest that judges should never be promoted. But, in fact, neither of these things would work.

And so it will remain a serious problem. Bob Drinan¹⁵ told me that they have the same trouble in the Church. He said that there it is called "scarlet fever."

In the end, it is something that somehow the judges have to handle themselves.

The third possible threat, and a much more subtle one, is one that I learned about from Justice Black. When our current Chief Justice was a young lawyer, he wrote an article saying that Law Clerks should be confirmed by the Senate because they were such dangerous people. He had been a Law Clerk and I guess he knew.

I asked Justice Black what would happen if young Rehnquist's proposal became the law. Justice Black replied, "No, no, I'm sorry. I wouldn't put a young man through that. I was a Senator myself once, and I would not put a young man through a Senate confirmation hearing." "But Judge," I foolishly asked, "what would you do then?" He answered, "I'd do without law clerks. My

14. As reported in Judge Guido Calabresi, Seminar Remarks. The Community of Courts: The Complete Appellate Judge, at a conference co-sponsored by the State Justice Institute, the Appellate Judges Conference of the ABA, and the Federal Judicial Center (Mar. 28-31, 1996).

15. Robert Drinan, S.J. is a professor at Georgetown University Law Center.

opinions would not be quite as learned, and they would certainly be shorter, but they would still be O.K.”

And, of course, he would have done better than just fine without any of us.

Then he turned very serious and said, “There is something important to get out of this. They cannot take away my salary. So they cannot really do much to me. They can take away my law clerks. But I can do well enough without clerks. They can take away our building. But I can decide sitting on the street. No, they cannot do very much.”

He continued: “Beware of anybody who wants to make judges’ lives too comfortable by giving them assistants, beautiful buildings, monies for this, monies for that. That is what makes members of so-called independent agencies not independent, even though many of them are there for fourteen years. They depend on the Senate or House Committees to recommend the money they need to do their jobs; and therefore they are beholden to Congress, and are never free. Judges do not need anything but a pen and paper and use of the law library that any city bar association or law school has.”

One of the things that has made the Judiciary somewhat less independent than it used to be, not perhaps in a dramatic sense but in a subtle way, is that we are, that we have come to be, too dependent on the Administrative Office of the Courts, on fancy offices, on elegant Court houses, on too many law clerks, on a whole lot of bureaucracy that Congress can take away by not allocating the money needed to support it. I have actually had a judge say to me: “Why not take that phrase out of your opinion, you do not need it, and it might offend the Senate. And you know how that could affect the judicial budget.” That is very dangerous. We have got to be extremely careful not to become dependent in this subtle but pernicious way.

Once we get beyond that, most everything is over and *we* are personally independent. There remains one other matter though, if we are talking about independence of legal decision-making rather than independence of judges. And that is the issue of jurisdiction — of what the jurisdiction of the court is. This is an extremely serious problem because, if the jurisdiction of courts is inappropriately limited, judicial independence will suffer greatly. What judges can do about this, however, is much more difficult to say.

Sentencing guidelines are an interesting example. [J. Greenberg] was quite right to say that Congress can set the sentences. Of course it can. But is it the same thing for Congress to set sentences as for Congress to give prosecutors the power, in practice, to determine what a sentence will be? Is it the same thing for Congress to decide that all aliens will be excluded from the United States as it is for Congress to say that non-Article III bureaucrats will be free to decide which aliens will be excluded?

It is very hard for judges to deal responsibly with issues of jurisdiction. It is, I think, much more difficult than [J. Sporkin] suggests. I tend to be restrained in these things. But I do see a danger that we have not focused on when, under the guise of saying no-jurisdiction, the Legislature takes what is essentially judicial power away from people who are Article III independent, and gives it to people who are not Article III independent. It is a powerful way of making what are in fact judicial decisions ultimately dependent on the legislative will.

The Academy has not written about it. We as judges cannot do much about it. At least we cannot, unless and until someone comes up with a workable definition of what is and what is not proper delegation of Congressional authority. And on that, I would not hold my breath.

One final point: I agree with Judge Greenberg that we judges have brought some of this sort of thing on ourselves by doing things that we should not have done. I think there is a tendency for judges (on "the right," no less than on "the left") to reach constitutional issues, and decide them, needlessly. There are many cases in which we could perform our function of pointing out to Congress and to the people that a law presents serious constitutional problems without determining ultimate constitutional questions.

We should make much more use than we do of Alexander Bickel's second-look type doctrines.¹⁶ These are approaches that allow us to say that there are constitutional problems with a statute without actually holding that law unconstitutional. These doctrines would have courts say to Congress: "Think about the law you just passed. If you really mean it, then, and only then, will the serious constitutional questions it poses have to be faced." If we do that, Congress, because it is responsive to the electorate, will often look

16. Alexander M. Bickel was the Chancellor Kent Professor of Law and Legal History at Yale Law School. *See, e.g.,* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

at the statute, revise it, and come out with something that is constitutionally acceptable.

If the courts can only either uphold such constitutionally problematic statutes, or strike them down, then we are apt to do both too little and too much. And then, we will get the kind of reaction that we have been debating today.

* * *

JUDGE BAER: Does anybody else have a question? Yes.

AUDIENCE: I was a bit troubled by Judge Greenberg's comments about the Federal Judiciary and the non-democratic process. I thought that when I learned about Article III of our Constitution, the whole idea was that the Federal Judiciary is supposed to be removed from these reams of hypocrisy. I would like you to comment on that.

JUDGE GREENBERG: That is right. That is exactly right. It is supposed to be removed. It is not supposed to be democratic. There was a lot of talk that the Congress senses the will of the people. Funny, I thought that was good if Congress sensed the will of the people. I thought that was the whole idea, but the judges are not supposed to sense the will of people.

I want to tell you something I have learned. I have been a judge a long time — the more power you have, the more restraint you use, and I know that. I have got a lot of power, but I couple it with a lot of restraint.

JUDGE BECKER: [J. Greenberg], you have no power without one other vote.

* * *

JUDGE CALABRESI: I do not believe that judges should go around complaining about being criticized. It is whining, and people have a right to criticize us. It is hard to take criticism. But I find it as unpleasant when judges complain about being criticized as I did when I read Thomas Mann, who was always sniveling about the difficulty of being a writer, the difficulty of creating. If he did not like writing, he should have done something else. And the same goes for judges.

Criticism comes with the job. People ought to be able to criticize us, and we should be capable of putting up with it. On the other hand, too much criticism does have the effect of undermining confidence in the Judiciary and in our system of government. That does not mean, though, that we judges should respond to the

attacks. We are in the job; if we do something wrong, people will properly criticize us. If criticism becomes endemic in a way that undercuts the confidence of people in the court system, then it is up to the bar to answer. It is not up to us.

JUDGE BAER: I think what you say is so, but I must say, and I have really controlled myself here, that it is helpful, it seems to me, if the media gets it right. I think the criticism is absolutely what everybody in jobs like ours is in for if they want to decide, and hopefully they do decide cases as they see them; and I do not have any problem about that.

I do have a problem when, in fact, the media, who has not been maligned today like lots of other people and things, I do have a problem when they do not have either the time, energy, inclination, or wherewithal to read what they are talking and writing about because I think it does just what you are saying. I think it makes it very much harder for the public to have any confidence in the Judiciary.

* * *

AUDIENCE: I am a practitioner in New York. It is my perception, and I wonder if you share it, that perhaps one is facing a judge who has a particular bent, has a strength in a certain area, and then decides cases on the basis of this prior experience.

* * *

JUDGE WALLS: Since I was at the state level for more than fifteen years in an appointed judge system, I would say that it is not so with regard to "supposed predilections" based on one's background in determining how he or she was going to rule. As a matter of fact, it was quite common for men and women who had been Assistant Prosecutors to be considered within months of taking the bench, you know, more or less pro-defendant; and you would have former public defenders now talking law and order.

So I would suggest that, as [J. Becker] said, after a while your ideology does go behind you and particularly in our state. I cannot speak for New York State, but for New Jersey where judges are appointed; and after the first full term if they are reappointed, they have tenure until the retirement age of seventy, then I would suggest that system brings out the best regardless of one's background.

JUDGE DUBOIS: Some would say the answer to that question is a lot depends on the appointer. Lou Pollak, one of our most

beloved colleagues, would disagree, and he did so in an excellent article, entitled "Criticizing Judges."¹⁷

What Lou said in the article, after Orrin Hatch had been particularly strident in criticizing a Carter appointee to the Court of Appeals and referring to other judges as Reagan judges and Bush judges, what he said was they are not Reagan judges, they are not Bush judges, they are not Carter judges, they are all United States judges. I think all of us take that very seriously.

I lunch with my colleagues every day, I lunch with former prosecutors, I lunch with former defense lawyers and they do not view themselves as former prosecutors or former defense lawyers. I can tell you their opinions do not show it. They view themselves as federal judges, and they take their jobs very seriously; and I hope for you in your district that it works that way too. It should work that way. That is the system at its very best.

JUDGE BAER: We only have a couple of more minutes, and I wonder if there are any last thoughts.

JUDGE CALABRESI: I just want to underline that what [J.] DuBois said is extremely important. It is just as he said it, at least in my court. We may be wrong, and often are, but we are not wrong because of who appointed us. And we are not wrong in any consistently ideological direction. In most cases, I cannot possibly guess how my colleagues will come out on the basis of who appointed them or what party affiliation they had before their appointment. And that is as it should be.

JUDGE BAER: Does anybody want to have a last thought?

JUDGE BECKER: I just want to point out on behalf of the class of 1957, there are six of us here. Roy Daly¹⁸ has gone to his great reward, a great man, a great guy; and Anna Johnston Taylor, who is the Chief District Judge in Detroit, could not be with us. When there were eight of us, when Roy was still alive, having in mind that there are 846 active — I am not talking about the seniors — active Article III judges, what that means is that the class of 1957 of 140-some people had one percent of the active Article III Judiciary in the United States.

* * *

JUDGE BAER: Let us adjourn in Arthur Liman's memory. Arthur was a member of this class, of the class of 1957. Not only

17. Louis H. Pollack, *Criticizing Judges*, 79 JUDICATURE 298 (May/June 1996).

18. The Honorable T.F. Gilroy Daly, a senior U.S. District Judge in Connecticut, graduated from Yale Law School in 1957.

was he a spectacular lawyer, but I have had the pleasure of trying two cases with his son Lou, an Assistant United States Attorney in the Southern District of New York. It was a pleasure for me and for all of us in the class to know Arthur in law school, and for me at least to know him better and better afterwards. Indeed, his spirit and intellect live on.